

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Further Forbearance from)
Title II Regulation for Certain)
Types of Commercial Mobile Radio)
Service Providers)

GN Docket No. 94-33

RECEIVED

JUL 11 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association
("CTIA")¹ respectfully submits its reply comments to the
Notice of Proposed Rule Making in the above-captioned
proceeding.²

Introduction

In its comments, CTIA endorsed the Commission's
tentative conclusion to refrain from exercising its
forbearance authority in the application of Sections 210, 213,
214, 218, 219, 220, 223, 225, 226, 227, and 228 to all CMRS
providers. Specifically, CTIA urged the Commission not to
allow exemptions from these Title II requirements for certain
classes of CMRS providers because such exemptions undermine

¹ CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry. CTIA and its members have a direct and vital interest in the outcome of this proceeding.

² In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, FCC 94-101, 9 FCC Rcd 2164 (released May 4, 1994)("Notice").

No. of Copies rec'd 0+9
List A B C D E

both the clear public policy initiatives to extend consumer protection provisions to all CMRS providers and the recently established comprehensive federal scheme of regulatory parity for CMRS. Several commenters in this proceeding, however, advocate further forbearance for certain classes of CMRS providers based on size, customer base, market dominance, or technical distinctions. CTIA strongly reiterates its position that to start exempting certain classes of CMRS providers from the Title II obligations addressed in this proceeding would undermine important consumer protection and public policy goals and would risk recreating the very structure of disparate regulations for similar services that Congress sought to abolish in amending Section 332(c) of the Communications Act.³ In addition, such exemptions would threaten the consistent regulatory treatment envisioned by the Commission in the *Second Report and Order*.⁴

Further Forbearance Based on the Size or Customer Base of a CMRS Provider

Several commenters contend that further forbearance from the applicable Title II requirements is appropriate for "small" CMRS providers⁵ and for CMRS providers serving the

³ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312, 392 (1993).

⁴ *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, Gen. Docket No. 93-252, FCC 94-31, 9 FCC Rcd 1411 (released March 7, 1994) ("*Second Report and Order*").

⁵ American Mobile Telecommunications Association, Inc. ("AMTA") Comments at 7; Dial Page Comments at 2, n. 4; National Association of Business and Educational Radio, Inc. ("NABER") Comments at 10-12; Nextel Comments at 7-8; OneComm Comments at 3-7; Utilities Telecommunications Council ("UTC") Comments at 4, United States Sugar Corporation ("U.S. Sugar") Comments at 20-22.

business community.⁶ CTIA contends that the relative size of the CMRS provider, i.e., "small", or whether its customer base is limited to "eligible users" is inappropriate for determining further forbearance. First, the size or customer base of a CMRS provider does not necessarily hinder or provide adequate safeguards against the abusive practices that Congress sought to eradicate by enacting many of these Title II Sections. Moreover, by allowing disparate regulatory treatment of a CMRS provider based on the "smallness" or the class of eligible "business" users contravenes the congressional intent to achieve uniform rules and regulatory symmetry among mobile services that are similarly situated. Such regulatory disparity would return the CMRS industry to the dual regulatory approach Congress abolished when it amended Section 332(c).

CTIA agrees with several commenters that developing and implementing an appropriate definition of "small" CMRS providers would be difficult and would create a regulatory nightmare for the Commission and CMRS providers.⁷ The commenters that advocate further forbearance for "small" CMRS providers provide numerous and diverse criteria for a "small"

⁶ Geotek Comments at 4. *See also* AMTA Comments at 9 (While AMTA asserts that business customers are more knowledgeable and in a better position to bargain for their needs than the typical individual customer, AMTA provides no data or evidence supporting this assertion. Furthermore, while a truck stop operator providing pay phone service to the public may qualify as a "business customer", the CMRS service will be purchased by individual non-business customers.)

⁷ Bell Atlantic Mobile Systems, Inc. ("Bell Atlantic") Comments at 5; Pacific Bell and Nevada Bell ("Pacific/Nevada Bell") Comments at 5. *See also* Dial Page Comments at 2-3, n. 4 (While Dial Page generally supports further forbearance for small CMRS providers, it concedes the difficulty in establishing an appropriate definition of a "small" CMRS provider.)

CMRS provider. For example, AMTA and Nextel define "small" as non-paging CMRS providers serving less than 5,000 subscribers nationwide.⁸ U.S. Sugar equates "small" with traditional SMR services, i.e., dispatch services.⁹ OneComm defines "small" in terms of market dominance and traditional SMR services.¹⁰ While UTC supports a size factor based on average revenues per CMRS subscriber or percentage of interconnected traffic, NABER advocates a definition of "small" based on the size or use of the frequency or spectrum.¹¹ Such diverse and numerous criteria illustrate the difficulty that the CMRS industry and the Commission would have in reaching an appropriate consensus as to what constitutes a "small" CMRS provider.

As Pacific/Nevada Bell notes, "attempting to determine which carriers fall into what category at any given time would be an administrative nightmare."¹² Furthermore, a regulatory scheme based upon size or customer use provides a perverse incentive for CMRS licensees to constrain their growth. Such a regulatory scheme is inconsistent with the clear federal mandate to encourage the deployment of new CMRS technologies and services and to use spectrum more efficiently, not less efficiently.

⁸ AMTA Comments at 8; Nextel Comments at 8.

⁹ U.S. Sugar Comments at 20.

¹⁰ OneComm Comments at 4-5.

¹¹ UTC Comments at 4; NABER Comments at 11.

¹² Pacific/Nevada Comments at 5.

Further Forbearance Based On Market Dominance

Several commenters recommend that the Commission consider market dominance in granting further forbearance for certain classes of CMRS providers.¹³ CTIA maintains that the Commission properly has rejected the market dominance/non-dominance distinction proposed by these commenters.¹⁴ Any such distinction is unworkable given the tremendous growth of the CMRS industry. The Commission's recently adopted rules for PCS in General Docket 90-314,¹⁵ and the rapid expansion of ESMR service,¹⁶ make it evidently clear that the entry of new technology and wireless services will increase competition in the CMRS marketplace for cellular and all other CMRS providers.¹⁷ Thus, no class of CMRS providers, including

¹³ AMTA Comments at 5-7, Dial Page Comments at 4; NABER Comments at 4, 10; OneComm Comments at 4.

¹⁴ *Second Report and Order* at ¶ 175.

¹⁵ *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, Gen. Docket No. 90-314, FCC 94-144 (released June 13, 1994).

¹⁶ Nextel plans to expand its ESMR services to customers in 45 of the 50 largest wireless communications markets in the U.S. by the end of 1996. See Nextel Comments at 5 in response to *Further Notice of Proposed Rule Making, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252, FCC 94-100 (June 16, 1994).

¹⁷ Cellular, paging, and SMR currently compete in the CMRS marketplace, and additional services such as ESMR, satellite mobile services and PCS will provide potentially strong competitive options. See EMCI, Inc., *The Changing Wireless Marketplace*, A study presented to CTIA by EMCI, Inc. (December 1992), printed in, Cellular Brief: CTIA's Update on Key Wireless Policy Issues, at 1-5 (December 17, 1992) ("EMCI Study"). See also CTIA, *Cellular: Building for the Wireless Future*, Cellular Brief: CTIA's Update on Key Wireless Policy Issues (March 26, 1993) ("CTIA Cellular Paper").

cellular carriers, can exercise market power or limit competition within the CMRS industry.¹⁸

CTIA already has developed and provided an extensive record which demonstrates the competitive nature of the CMRS marketplace.¹⁹ AMTA, Dial Page, NABER, and OneComm simply repeat the same arguments concerning market dominance and the asserted lack of competition that the Commission fully considered and properly rejected in the *Second Report and Order*.²⁰

A "dominance/non-dominance" test would have exactly the opposite effect on providing safeguards to the public that Congress and the Commission intended. As CMRS competition removes all doubts concerning the competitiveness of all CMRS providers, the "non-dominant" exception would apply to every CMRS provider thereby reversing the Commission's decision in the *Second Report and Order* to preserve the consumer protection provisions of Title II of the Act.

¹⁸ It is well documented that CMRS providers lack market power. See John Haring and Charles L. Jackson, Strategic Policy Research, "Errors in Hazlett's Analysis of Cellular Rents," (September 10, 1993); *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 892 F.2d 62 (9th Cir. 1989); *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 661 F. Supp. 1504 (D. Ariz. 1987). See also *Preemption of State Entry Regulation in the Public Land Mobile Services*, Report and Order in CC Docket 85-89, 59 R.R. 2d 1518, 1533 (1986) (Commission determined that paging services lack market power.)

¹⁹ CTIA Request for Declaratory Ruling and Petition for Rule Making, RM 8179 (January 29, 1993); CTIA Comments and Reply Comments, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252 (November 1993). See also, Besen et al., Charles River Associates, "An Economic Analysis of Entry By Cellular Operators Into Personal Communications Services," submitted as an Appendix to CTIA Comments, *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, Gen. Docket No. 90-314 (November 1992).

²⁰ *Second Report and Order* at ¶¶ 135-154.

Further forbearance based on a market dominance/non-dominance test recreates the disparate regulatory treatment for substitutable services which Congress and the Commission have sought to abolish. In addition, such disparate treatment would provide a legitimate way for all CMRS providers to circumvent each of the Title II consumer safeguards that are the subject of this proceeding.

Further Forbearance Based on Technical Distinctions

NABER and E.F. Johnson Company advocate further forbearance based on technical distinctions. For example, NABER recommends a distinction based upon the amount of spectrum allocated to CMRS providers and their degree of market dominance.²¹ E.F. Johnson advocates further forbearance based on frequency reuse when such reuse permits the licensee to operate its channels on a primary basis throughout a service area.²²

Further forbearance based upon technical distinctions such as frequency reuse and spectrum allocation is unworkable and inappropriate. Technologies currently exist which can offer functionally equivalent services without frequency reuse. For example, Geotek plans to offer mobile services in the northeastern U.S. by the end of 1995 using a frequency-hopping radio technology developed by the Israeli Defense

²¹ NABER Comments at 10.

²² E. F. Johnson Comments at 6, n. 8.

Department and will provide 25-30 times more capacity on a given frequency than cellular services.²³

The CMRS marketplace is characterized by the rapid introduction of new technologies. Because of the pace of technological innovations, distinctions based on frequency reuse and spectrum allocation would quickly become outdated and subject CMRS providers to inconsistent and antiquated regulatory treatment. As noted in the above discussion with respect to "size", technical distinctions can also have the perverse effect of providing CMRS licensees with an incentive not to deploy new technologies, not to introduce new services, and not to use their spectrum as efficiently as possible. Such results are not what Congress and the Commission had envisioned when they established a comprehensive federal scheme of regulatory parity for CMRS.

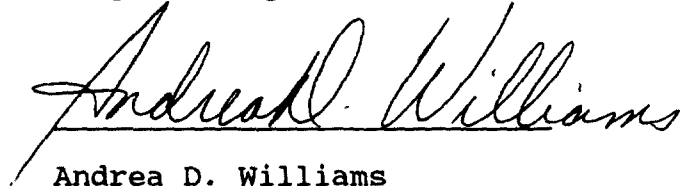
Conclusion

For the foregoing reasons, CTIA strongly urges the Commission to reject proposals supporting further forbearance from the applicable Title II Sections based upon size, customer base, market non-dominance, technical distinctions, or any other class-based distinctions. CTIA reiterates that such distinctions undermine the comprehensive federal scheme

²³ See Gautam Naik, *Geotek Will Get Infusion of Cash from Soros, Other*, Wall St. J., November 3, 1993, at B6; Edmund L. Andrews, *Radio Dispatchers Set to Rival Cellular Phones*, N.Y. Times, November 5, 1993, at D4. See also Geotek Comments at 3-4 in response to *Further Notice of Proposed Rule Making, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252, FCC 94-100 (June 16, 1994).

of regulatory parity that Congress and the Commission has established for CMRS.

Respectfully submitted,

A handwritten signature in cursive script, reading "Andrea D. Williams". The signature is written in dark ink and is positioned above the typed name and title.

Andrea D. Williams
Staff Counsel

Michael F. Altschul
Vice President/General Counsel

**Cellular Telecommunications
Industry Association**
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

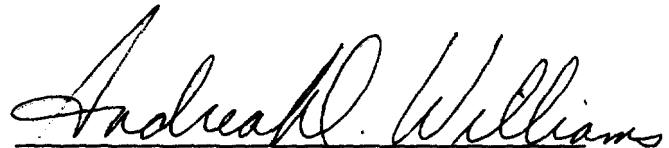
July 11, 1994

CERTIFICATE OF SERVICE

I, Andrea D. Williams, hereby certify that on this 11th day of July, 1994, copies of the foregoing Reply Comments of the Cellular Telecommunications Industry Association were served by hand delivery upon the following parties:

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

International Transcript Service
1919 M Street, N.W., Room 246
Washington, D.C. 20554


Andrea D. Williams

CERTIFICATE OF SERVICE

I, Stacie Brooks, certify that on this 11th day of July, 1994, a copy of the foregoing Reply Comments of Cellular Telecommunications Industry Association was sent by U.S. mail, postage prepaid, to each of the parties listed below:

Carolyn C. Hill
ALLTEL Service Corporation
655 15th Street, N.W.
Suite 220
Washington, D.C. 20005

Robert J. McKee
AT&T Corporation
295 North Maple Avenue
Room 3245H1
Basking Ridge, New Jersey 07920

American Mobile Telecommunications
Association, Inc.
c/o Elizabeth R. Sachs, Esq.
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W., Suite 700
Washington, D.C. 20006

Bell Atlantic Mobile Systems, Inc.
c/o John T. Scott, III
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

Jim O. Llewellyn
BellSouth Corporation
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610

Dial Page, Inc.
c/o Gerald S. McGowan
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W., Suite 700
Washington, D.C. 20006

E. F. Johnson Company
c/o Russell H. Fox
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Michael S. Hirsch
Geotek Communications, Inc.
1200 19th Street, N.W., #607
Washington, D.C. 20036

David A. Reams
Grand Broadcasting Corporation
P.O. Box 502
Perrysburg, Ohio 43552

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

In-Flight Phone Corporation
c/o Rodney L. Joyce
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Cathleen Massey
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036

National Association of Business
and Educational Radio, Inc.
c/o David E. Weisman, Esq.
Meyer, Faller, Weisman and Rosenberg, P.C.
4400 Jenifer Street, N.W., Suite 380
Washington, D.C. 20015

Robert S. Foosaner
Nextel Communications, Inc.
800 Connecticut Avenue, N.W.
Suite 1001
Washington, D.C. 20006

Jacqueline E. Holmes Nethersole
NYNEX
120 Bloomingdale Road
White Plains, New York 10605

Michael R. Carper
OneComm Corporation
4643 Ulster Street, Suite 500
Denver, Colorado 80237

Jeffrey B. Thomas
Pacific Bell/ Nevada Bell
140 New Montgomery Street, Room 1522A
San Francisco, California 94105

SEA, Inc.
c/o Thomas J. Keller
Verner, Liipfert, Bernhard
McPherson and Hand
901 15th Street, N.W., Suite 700
Washington, D.C. 20005-2327

Southern Company
c/o Carole C. Harris
Keller and Heckman
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001

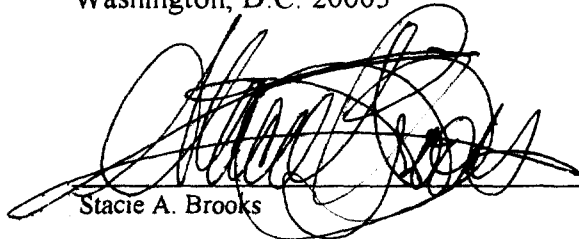
Karen B. Peck
Southwestern Bell Mobile Systems, Inc.
17330 Preston Road, Suite 100A
Dallas, Texas 75252

United States Sugar Corporation
c/o Wayne V. Black
Keller and Heckman
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001

Jeffrey L. Sheldon
Utilities Telecommunications Council
1140 Connecticut Avenue, N.W., Suite 1140
Washington, D.C. 20036

Waterway Communications System, Inc.
c/o Martin W. Bercovici
Keller and Heckman
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001

WJG Martitel Corporation
c/o Susan H. R. Jones
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005



Stacie A. Brooks